In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1310

PAUL WASHINGTON KIBBY, CHARLES R. STEWART and CARL MCFADDEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted by the court, sitting without a jury in the United States District Court for the Eastern District of Missouri, for illegal purchase and sale of narcotics, in violation of 26 U.S.C. 4704(a) and 4705(a) (R. I, 1–4; R. II, 152–154). Each was sentenced to imprisonment for a period of twenty years (R. I, 23–24; R. II, 169–170; Pet. App. 21–26). The court of appeals unanimously affirmed the convictions, finding that it was not necessary to decide whether petitioners were entitled to rely upon the defense of entrapment, while, at the same time, denying the substantive acts charged (which was their sole contention on appeal), because the facts of this

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case, as a matter of law, did not in any event show entrapment. (Pet. App. 30–38; R. III, 1–10).

The evidence at the trial of petitioners Kibby and Stewart (which is also illustrative of the evidence against petitioner McFadden)[1] conclusively demonstrates that entrapment was not an issue in this case. It shows that one Dudley G. Brown, a government informer and long-time acquaintance of Kibby and Stewart, made arrangements by telephone to have those two petitioners (on various occasions) sell narcotics to him. Pursuant to these arrangements, petitioners would deliver the narcotics to Brown's home and pick up marked money furnished by the Federal Bureau of Narcotics (R. II, 10–30, 35–38, 42, 49–58). No inducement was offered beyond making available a willing buyer with sufficient funds to make the purchase. A narcotics agent was hidden on the premises at the time of each transfer and verified in detail the informant's testimony (R. II, 59–68, 70–87). Each petitioner testified and denied making any sales of narcotics to Brown at any time (R. II, 114–125, 133–139).

It is, of course, a common practice for a government agent or informer to pose as a potential buyer of illegal goods, such as narcotics. Indeed, in such cases it "is all but impossible to obtain evidence for prosecution save by the use of decoys," *Lewis* v. *United*

[1] Petitioners Kibby and Stewart were tried together and McFadden separately. The certified record filed with this Court includes only the transcript of the Kibby-Stewart trial. Since all petitioners concede that the "evidence presented against the three defendants was essentially the same" (Pet. 7), reference to the record will be illustrative of all three cases.

States, 385 U.S. 206, 210, n. 6. When, as here, the government informer merely makes it known that he is an available buyer of the illegal goods, it is well established that, as a matter of law, no entrapment takes place when the defendant fills the order. See, *e.g., United States* v. *Ball,* 344 F. 2d 925 (C.A. 6), certiorari denied, 382 U.S. 907; *Brainin* v. *United States,* 314 F. 2d 460 (C.A. 5); *Hester* v. *United States,* 303 F. 2d 47 (C.A. 10), certiorari denied, 371 U.S. 847; *United States* v. *Place,* 263 F. 2d 627 (C.A. 2), certiorari denied, 360 U.S. 920. The court of appeals properly so held in the instant case.

Petitioners err in asserting that the court of appeals decided that the defense of entrapment was not available unless the substantive acts charged were admitted (Pet. 10–11). The court below noted the conflicting authority on that point but concluded that it was unnecessary to resolve the issue in this case (Pet. App. 33–35). Nor did the trial court rule that inconsistent defenses were not available; it overruled generally motions which asserted entrapment as a defense. The government called the inconsistency of the defenses to the attention of the court but also indicated that the evidence was wholly insufficient to raise the issue of entrapment (R. II, 150–151). The trial court would hardly have made a general ruling if it considered the record as remotely supporting the defense of entrapment, particularly since the verdict of guilty necessarily implies that the court rejected petitioners' specific denials of the acts charged.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967